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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 1243

NATIONAL LABOR RELATIONS BOARD,
Respondent,

v.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

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Opinion Below

Opinion of the United States Court of Appeals is reported at 385 F2d 874.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254 (1).

Questions Presented

(1) Was the Board's order as enforced by the Court of Appeals requiring the Petitioner to reimburse 450 individual non-members for permit or service fees to the extent

of $3.50 of every $10 permit fee received for the years 1958, 1959, 1960, 1961, 1962, 1963, amounting to $95,000 together with interest at 6% per annum on the basis of separate calendar quarters, in the nature of a penalty, which is prohibited, e.g., *Local 60, United Brotherhood of Carpenters* v. *N.L.R.B.*, 365 U. S. 651, 655 (1961), particularly where the Court of Appeals rejected a finding of blanket discrimination in the operation of the Hiring Hall (321 F2d 130, 134, 135, 138).

(2) Was the Court of Appeals under the powers granted to it under the National Labor Relations Act authorized to make a finding that Permit or Service fees which were in an amount equal to the monthly dues paid by Union Members, were excessive, particularly where the Board made no such finding (321 F2d 130, 135).

(3) Was the Trial Examiner justified in limiting proof as to what proportion of the fees paid were reasonably related to the value of the services furnished by the Hiring Hall rather than the value of the services provided by the Union, as set forth in the language of the Court of Appeals in its remand, particularly where the services of the Union are integrally a part of the services of the Hiring Hall.

(4) Does the Board's order, as enforced by the Court, effectuate the purposes of the Act, where the 450 Permit Men who have long since become Members of the Union, receive $95,000 from the Treasury of Respondent in the nature of a windfall, where of the nine (9) persons allegedly discriminated against, only one (1) was a Non-Member.

Statutes Involved

Pertinent provisions of the National Labor Relations Act, 29 U.S.C. Section 157; Section 158 (b) (1); Section 158 (b) (2); Section 160 (e) read as follows:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§ 158

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention or membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as acquiring or retaining membership;

§ 160

PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * * * *

Statement

The Petitioner, Local 138, International Union of Operating Engineers, AFL-CIO, under an order of the Board dated July 9, 1965, which adopted a decision of Trial Examiner Frederick U. Reel, dated August 19, 1964, *per se*, is required to refund the sum of $3.50 of every $10 Permit Fee received, during the six years of 1958, 1959, 1960, 1961,

1962, 1963, plus 6% interest per annum, on the basis of separate calendar quarters. The Board, in adopting the Trial Examiner's decision, said "it is unnecessary and to a certain extent, impracticable, to determine with greater precision the exact amounts due or to vary the amounts of refunds during each of the years here involved" (p. 7 of Joint Appendix, Court of Appeals, 2nd Cir. Docket 31,177). 153 NLRB 1375, 1377.

The Court of Appeals enforced the above order of the Board in a decision dated November 27, 1967 reported at 385 F2d 874. Following the denial of a petition for a rehearing, the Court's decree was entered on January 4, 1968.

The order for reimbursement of permit fees stems from charges of Unfair Labor Practices leveled against the Petitioner by 9 persons, eight of whom were Members of the Petitioner Union and one was a Member of a sister Local Union but working out of the Petitioner Union under a permit.

The Court of Appeals in an earlier decision dated July 8, 1963 and reported at 321 F2d 130, held that the Petitioner had violated the National Labor Relations Act, 29 U.S.C. Section 141 *et seq.* by maintaining a Collective Bargaining Agreement with an employer's association which included provisions discriminating in favor of Union Members, by operating a discriminatory Hiring and job referral system and exacting an unlawful fee of non-members for the use of the referral system.

On the Remand, proof was taken before Trial Examiner Reel which included certain expenses and activities of the Union, particularly the sum of $2 which the Union deducted from each $10 Permit Fee and remitted to the International Union in Washington, D. C. for services rendered by the parent body to the Local Union in accordance with the provisions of the International Constitution.

From the balance remaining the Trial Examiner ordered the sum of $3.50 refunded to 450 Permit Men for the six years in question with 6% interest, on the basis of calendar quarters. The total was $95,000 which, in addition to interest to date, amounts to approximately the sum of $150,000.00.*

During the proceeding on the Remand, proof was submitted which demonstrated that the service fees of $2 which the Union remitted to the International Union was integrally related to the services rendered to the Local Union Petitioner by the International.

Testimony was submitted to the effect that the International had a lobby in Washington for favorable legislation to promote the creation of new work in the area of public works, roads, bridges, etc. Witnesses testified to the help the International gave in helping initiate the construction of a bridge which is scheduled to cross Long Island Sound from Plum Island to Connecticut and Rhode Island. These were called "positive efforts" to obtain work in the industry and which work percolates down to every one including Union Members and Permit Men who used the Hiring Hall.

Although not specifically referred to, it is common knowledge that the International Union of Operating Engineers in Washington is the labor organization in the United States authorized by the AFL-CIO to negotiate and undertake National Pipeline contracts for the transmission of oil and natural gas from oil and gas fields located in Texas and Oklahoma to all the States in the country. Thus, all work connected with the excavation,

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* In addition, the Board ordered back pay to nine discriminatees in the sum of $95,685.59 plus 6% interest. Court of Appeals denied enforcement and ordered cause remanded. (See 380 F 2d 244.) Board has ordered 2nd back pay case involving same 9 persons covering different period reopened for additional proof, wherein sum of $46,000 approximately is sought.

installation and maintenance of natural gas and oil pipelines emanating from Texas and Oklahoma and other natural gas and oil producing States is done by the Local Union in whose territory these pipelines enter.

Pipelines installed by the New Jersey Local Union continue to the center of the Hudson River where the Local Union in New York pick them up and carry them to Long Island where the Petitioner Union carries on. The work, of course, is distributed equally to Members and Non-Members of the Petitioner.

In addition, the General President of the International or his Deputy has for many years been a member of the National Joint Disputes Board of the Building Trades Department, set up with the approval of the President and the National Labor Relations Board. In determining the allocation of the work in dispute to a constituent Local of the Operating Engineers Union rather than to another trade, that decision, if favorable to the Operating Engineers enures ultimately to the benefit of the Member and Non-Member alike of the Petitioner.

The broad and widespread benefits accruing solely from the strength which a parent or international organization gives to Local Unions in effect prevent the predatory approach of other organizations seeking the work of the Petitioner. The latter through its International Union may be said to have a "friend in Court." The sums rejected by the Trial Examiner in the form of the $2 service fee remitted to the International Union alone amounted to the sum total of $211,434, for the years in question and which would have more than equalized the sum ordered to be refunded. Yet the work services and benefits made available by this $2 service fee, dripped down and percolated through the Hiring Hall for the benefit of the Union Member and Non-Union Member alike.

REASONS RELIED ON FOR GRANTING WRIT

POINT I

The order of reimbursement is in the nature of a penalty prohibited by the Act and does not effectuate the purposes of the Act.

1. The Court of Appeals (Moore, Smith & Kaufman, JJ.) (Back Pay case) justified the enforcement of the Board's Order of reimbursement of Permit Fees on the erroneous conclusion that "charging Permit Men a fee for the use of the Hiring Hall which is equivalent to the dues paid by Union Members on the theory that Permit Men receive all of the benefits of Union Membership will necessarily encourage Union Membership in violation of the Permit Men's Section 157 rights; likewise, it will encourage Union Membership".* 385 F2d 874, 877.

The same Court of Appeals (Lumbard, Ch. J., Waterman and Friendly JJ.) in 321 F2d 130, *supra* (Unfair Labor Practice Case), at page 135 speaking through the Chief Judge said:

> "We have rejected above the apparent finding of blanket discrimination. And while the limited discrimination which we have found to be supported by the evidence may have reduced in some degree the value of the referral services to non-members, the absence of any complaint except those made by members of the Reform Group indicates that some value was received by non-members for their fees. We do not have before us any information as to the number of non-members who paid fees or the total amount of money which the union would have to return if the

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* Virtually all permit men were admitted into membership of the Petitioner union on July 1, 1963. 153 NLRB 1387 footnote 3. See also Joint Appendix in Court of Appeals, p. 30 footnote 3.

Board's order were enforced as it now reads. But in view of the period of time covered and the possibly large number of men involved, the Board's order might be in the nature of a penalty, which is prohibited. E.G., Local 60 United Bhd. of Carpenters v. N.L.R.B., 365 U. S. 651, 665 (1961). We deny enforcement of this portion of the Board's order and remand it to the Board for further findings. *The Board should consider on remand what proportion of the fees which were paid were reasonably related to the value of the services provided by the union, having in mind also the cost to the union of performing such services. Any excess over that amount could properly be ordered returned to the men who paid it.* The Board, will, of course, have in mind our rejection of the finding of blanket discrimination in determining whether such an order is warranted." (Italics supplied for language of remand)

In his concurring and dissenting opinion Judge Friendly at 321 F2d 130, *supra,* at page 138 says:

"I thoroughly agree with my brothers' conclusion that the Board's wholesale findings of discrimination against permit men in the operation of the hiring hall were not founded on substantial evidence".

Continuing at page 139 Judge Friendly says:

"However, requiring non-members to pay an unreasonably high amount for the use of facilities operated by a union—as the identity of amount here strongly suggests and the 20% remittance to the International reinforces—infringes the right of employees, guaranteed by § 7, to refrain from assisting labor organizations * * * but the evidence makes it clear that there was in fact no insistence on union membership * * *."

The above statements taken from the opinions of both the majority and dissenting Judges in the opinion at 321 F2d 130, make it abundantly clear that there is no foundation for the conclusion of the Court per Smith, C.J. in 385 F2d 874, 877, that charging permit fees which are equivalent to dues paid by Union Members encourages violations of their rights under Section 7 or encourages employers to discriminate against employees to encourage Union membership.

As this Court pointed out in *Local 60 Carpenters* v. *NLRB*, 365 U. S. 651, 653 there was no evidence that Union Membership fees or dues were coerced, rejecting the views of the Board and the Court of Appeals that coercion was to be inferred. In the case of *Local 60, supra*, the Board argued that where abuse of hiring arrangements has been shown, reimbursement of dues is protective of the rights vindicated by the Act and authorized by Section 10(c). This Court rejected this argument, stating the case was not governed by *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, where a Company Union was involved. Return of dues was one means for disestablishing an unlawful Union. Continuing this Court said:

> "Where no membership in the Union was shown to be influenced or compelled by reason of any unfair practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the Members; and no 'dissipation' of the effects of the prohibited action is achieved. *Labor Board* v. *Mine Workers, supra*, 463. The order in those circumstances becomes punitive and beyond the power of the Board." 365 U. S. 651, 655.

Mr. Justice Harlan in *Local 60 Carpenters* v. *NLRB, supra*, says:

> "But I can find no rational relationship at all between the amount of dues paid and the value an employee,

who is willing to join a Union would place on his freedom to change his mind."[2]

Absent a showing of coercion, the holding of the Court of Appeals, per Smith J. in granting enforcement of the Board's order for reimbursement of permit fees is wholely speculative and conclusory, as being without foundation and not based on proof in the record on the whole. This conclusion is compelling where the Court of Appeals per opinion by Chief Judge Lumbard and Judge Friendly each find that there was no finding of blanket discrimination in the operation of the hiring hall (*NLRB* v. *Local* 138, 321 F2d 130 *supra*).

POINT II

The Court of Appeals exceeded its power of review in making new findings of unfair labor practice not based upon substantial findings on the record considered as a whole.

It has been repeatedly stated that the Board has broad discretion to adapt remedies to the need of the particular situation so that the 'victims of discrimination' may be treated fairly. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. This power for "fashioning remedies", however, is not given to the Court of Appeals. The power to enforce orders of the Board under Section 10 (e) does not enable the Court of Appeals to make new findings particularly where the Board itself made no finding in the order it presented for enforcement.

In the case at bar, the General Counsel in his Brief to the Court of Appeals for enforcement of the Order ref-

[2] For example, an employee may be more willing to join a union which charges high dues and provides substantial benefits than a union which charges little and gives little. But the Board formula declares that in the case where the dues are higher the value of the loss of freedom of choice is greater.

erable to the Unfair Labor Practice in connection with the discriminatorily operated Hiring Hall (Point VII, p. 39 of the Board's Brief) argued that the Union had unlawfully exacted permit fees from non-members and hence the Board's order validly ordered the Union to refund all such fees (p. 58 of Appendix to Petitioner's Brief).

The Board had rejected the General Counsel's contention that all dues and fees should be refunded to Members who were discriminated against, on the ground that "they were long standing Union Members who were initially attempting reforms within the Union. We conclude therefore that they were not coerced or restrained into maintaining their Union Membership. Consequently, we think an order reimbursing them for dues and fees is inappropriate" (P. A. 55a).

The Board held that the Union could not lawfully exact a fee for the use of the Hiring Hall as it was discriminatorily operated.* The General Counsel did not argue that the permit fees were *excessive* either in his brief to the Court of Appeals or in his oral argument. It was during the oral argument that the Chief Judge made the comment that the permit fees were excessive and because of its surprise nature, the question of excessiveness was neither briefed or argued.

A petition for rehearing before the Court (Panel of Lumbard, Ch. J., Waterman and Friendly, JJ.) on the question of *excessiveness* was denied and the Petitioner again urged the point before the Court (panel of Moore, Smith and Kaufman, JJ.) in the Back Pay Case under Point II of its Brief with no better results. The Order enforcing the

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* "It is for this reason that we find the charging of the permit fee unlawful and we find it unnecessary to consider or adopt the Trial Examiner's additional reason for holding such fee unlawful" (see 139 NLRB 633, 636, 637).

refund of permit fees was granted by the Court on the very basis of excessiveness where the Court stated:

> "charging permit men a fee for the use of the hiring hall which is equivalent to the dues paid by union members . . . will necessarily encourage Union membership in violation of the permit men's Section 157 rights". (385 F. 2d 874, 877.)

That is the coercion which the Court rests on to justify the enforcement of the Board's order. The finding of excessiveness by the Court of Appeals was new; it had not been made by the Board. In fact, the Board rejected the recommendations of Members Rodgers and Leedom as to excessiveness as unnecessary to consider, on the ground that it had found the Union could not lawfully exact a fee at all for a referral system that was discriminatorily operated. (Appendix to Petitioner's Brief, Vol. I, p. 50a, footnote 8. In case of 321 F. 2d 130 *supra.*)

Ironically the Board found in the case of a sister Local Union of the Petitioner that a charge of $9 to non-members was not discriminatory or violative of the Act. See *Local 825 Operating Engineers*, 137 NLRB 1043.

In the case of *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 27 LRRM 2373 and its companion case of *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 27 LRRM 2382, this Court outlined the scope of judicial review to be undertaken by the Court of Appeals in matters pertaining to the Board.

In the case of *NLRB* v. *Walton Mfg. Co.,* 369 U. S. 404, 49 LRRM 2962, this Court again in a Per Curiam opinion stated that the *Universal Camera* and *Pittsburgh* cases state a rule for review by Court of Appeals in all Labor Board Cases. The Court in *NLRB* v. *Walton Mfg. Co., supra* stated:

> "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatment cases and another test in other cases (p. 407)."

The Court of Appeals having exceeded its reviewing power in the *Walter* case *supra* the matter was remanded by the Supreme Court under its doctrine of intervening, "only * * * when the standard appears to have been misapprehended or grossly misapplied", 340 U. S. at 491, 27 LRRM 2373.

The authority of the Court of Appeals to review order of the National Labor Relations Board is set forth in the National Labor Relations Act, 1947, 29 U.S.C. Section 160 (e), requiring that the "record considered as a whole" be canvassed.

In the case at bar, no proof was before the Court of Appeals at the moment, the Chief Judge made the surprising, unexpected and unsupported statement from the Bench during the oral argument, that the permit fees were excessive. Neither was there any proof submitted by the time the opinion was written. Apparently, by the simple method of comparing the permit fee with the union dues, to which they were equivalent, did the Court come to the conclusion that they were excessive. This method of deduction certainly does not conform to the rule laid down by the Supreme Court in the cases of *Universal Camera, Pittsburgh* and *Walton* cited above. Nor did it conform with Section 160(e) of the Act as to the limitations of review granted to the Court of Appeals.

The conclusion that the Permit Fees were excessive on the basis of being equivalent to the monthly dues, represented a new finding. Making such a finding exceeded the Court's power on review in Labor Cases. Further, it violated the fundamental rule of making findings without proof or evidence before it, on which to base the finding.

Sending the case back on Remand to take proof as to what proportion of the fee was reasonably related to the value of the services provided by the Union, did not erase the error initially committed by the Court in making the finding of excessiveness in the first place for the reason (a) the Board did not claim excessiveness; (b) the finding

exceeded the Court's power of review; and (c) the finding of excessiveness was made without proof, other than the fact that the amount of $10 charged permit men was the equivalent charged union members.

As this Court stated in *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 W. S. 217, 24 LRRM 2088, the decree of enforcement of the Board's order should be limited to such part of the order as is supported by the Board's findings. The Board, not the Court is the judge of the facts, credibility of witnesses and weight of the evidence as was said by the Court of Appeals in the case of *Kitty Clover Inc.* v. *NLRB* (CA-8), 208 F. 2d 212, 214, 33 LRRM 2177. Whether the permit fees were excessive or not, was a question of fact and not a question of law.

The Court concluded its opinion with the statement "that the controlling issues in this case were, under the evidence, issues of fact for the Board and are not issues of law for this Court." 208 F. 2d 212, 215.

On remand, Trial Examiner Reel was under a mandate of the Court of Appeals to compute the amount of Permit Fees to be reimbursed, if any. He was not authorized to make new findings of Unfair Labor Practices.

Hence, the statement of the Board, in its Supplemental Decision and Order (153 NLRB 1375) that in the light of the supplemental hearing and findings of the Trial Examiner, that it agreed with the Court of Appeals that the permit fees charged were excessive, did not make for a finding on which the order or reimbursement could be based. The statement became a retroactive agreement with the Court of Appeals conclusion, but it did not become a retroactive unfair labor practice for which the petitioner had to answer.

This Court in the case of *NLRB* v. *District 50 United Mine Workers of America*, 355 U. S. 453, 78 S. Ct. 386, held that modification of the cease and desist order by the Court of Appeals went beyond permissible limits of

judicial review under Section 10(f) and could not be sustained.

> "The orderly administration of the Act and due regard for the respective functions of the Board and reviewing courts require that we vacate the judgment of the Court of Appeals with instructions to remand the case to the Board for further proceedings consistent with this opinion." 355 U. S. 453, 464.

See also *NLRB* v. *7 Up Bottling Co. of Miami*, 344 U. S. 344, 73 S. Ct. 287.

More recently in the case of *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 86 S. Ct. 1018, this Court stated that a reviewing court is not at liberty to weigh the evidence and substitute its discretion for that of the Administrative agency, quoting Section 10(e) of the Administrative Procedure Act, 5 U.S.C. Section 1009(e) (1964 ed.). Further, this Court stated at footnote 17 at page 619 in 383 U. S. 607 *supra*, that a *de novo* review is not generally to be presumed.

CONCLUSION

The Court below, has so far departed from the accepted and usual course of judicial proceedings in failing to adhere to the limits accorded it for review of Administrative Agency's orders and in sanctioning a severe penalty by enforcing the Board's order of reimbursement, contrary to the purposes of the Act and the decisions of this Court, as to call for an exercise of this Court's power of supervision, in granting the writ of certiorari prayed for.

Respectfully submitted,

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Decree.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 31177

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondent.

DECREE

Before: MOORE, SMITH and KAUFMAN, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it, pursuant to remand, against the Respondent, its officers, agents, and representatives on July 9, 1965. The Court has considered the briefs and transcript of record filed in this cause. On November 27, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Local 138, International Union of Operating Engineers, AFL-CIO, its officers, agents, and representatives abide

and perform the directions of the Board in said order contained.

LEONARD P. MOORE,
Judge, United States Court of
Appeals for the Second Circuit.

J. JOSEPH SMITH,
Judge, United States Court of
Appeals for the Second Circuit.

Filed: Jan. 4, 1968.

Opinion.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 41—September Term, 1967.

(Argued September 25, 1967 Decided November 27, 1967.)

Docket No. 31177

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondent,

Before: MOORE, SMITH and KAUFMAN,
Circuit Judges.

Petition for enforcement of supplemental order of the National Labor Relations Board, 153 NLRB 1375 (1965), on remand pursuant to decision in the same case, 321 F. 2d 130 (2d Cir. 1963). Enforcement granted.

WARREN M. DAVISON, Attorney, NLRB (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Leonard M. Wagman, Attorney, NLRB, on the brief), *for petitioner.*

WILLIAM J. CORCORAN of Corcoran and Brady, New York, N. Y., *for respondent.*

Opinion.

SMITH, *Circuit Judge*:

The National Labor Relations Board petitions for enforcement of its supplemental order which issued after proceedings held pursuant to a remand by this court.[1] The Board ordered Local 138, International Union of Operating Engineers, to reimburse nonmembers for a portion of permit fees collected from them as a condition of referral or employment between June 9, 1958 and July 1, 1963.[2] We grant enforcement.

In its original decision in this case, the Board found *inter alia* that Local 138 had violated the National Labor Relations Act, 29 U.S.C. § 141 et seq., by operating a discriminatory hiring and job referral system and by exacting an unlawful fee of nonmembers for use of the system.[3] The Board ordered the union to cease and desist from maintaining any practice or enforcing any agreement with employers which unlawfully gives members preference over nonmembers in job referrals, or which conditions referrals on good standing in the union. Local 138 was also ordered to "reimburse all individual nonmembers for permit or service fees unlawfully exacted from them as a condition of referral or employment with interest thereon at six percent . . .", on the ground that the union could not lawfully exact a fee for the use of a discriminatorily operated hiring and referral system.[4]

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[1] *Local 138, International Union of Operating Engineers* v. *NLRB*, 321 F. 2d 130 (2d Cir. 1963).

[2] *J. J. Hagerty, Inc.*, 153 NLRB 1374 (1965).

[3] *J. J. Hagerty, Inc.*, 139 NLRB 633 (1962). The union had a collective bargaining agreement with an employers' association making it the "sole and exclusive source of referrals of applicants for employment."

[4] Other aspects of the order, discussed in our earlier opinion, *supra* note 1, are not here relevant. The full factual background of the case is set out in our earlier opinion.

Opinion.

On petition to review and cross-petition to enforce this original order, we did not find substantial evidence to support a finding of blanket discrimination against nonmembers in the operation of the union's hiring hall, but held that there was evidence of some discrimination, sufficient to justify the cease and desist portion of the order. *We thought that the Board had gone too far, however, in ordering that the permit fees be returned in toto, since there were indications that the nonmembers received some value from their use of the hiring hall.* Enforcement of that portion of the order was therefore denied.[5]

Although we thought that the union should be allowed to keep some part of the permit fees collected, we agreed with the Board that the fees, which were in an amount equal to the monthly dues paid by the union's members, were excessive.[6] We noted that

> The fees were charged solely for the use of the hiring hall. Yet of each $10.00 monthly payment, $2.00 was remitted by the local union to the International. While a union might under proper accounting procedures include in the cost of operating a hiring hall some reasonable percentage of the union's general expenses, the union has not argued before us that its charges to nonmembers were based on anything except an intention to exact from them the amount paid by members. This the union could not do under the guise of charging for its services as an employment agency.[7]

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[5] *As we noted, the Board's order for total reimbursement might well have been in the nature of a penalty, which is, of course, beyond the power of the Board.* See, *e.g., Local 60, United Brotherhood of Carpenters* v. *NLRB*, 365 U. S. 651, 655 (1961).

[6] The trial Examiner and two members of the Board were of the opinion that a permit fee for use of the hiring hall equal in amount to the dues paid by members is necessarily unlawful absent evidence that the fee is reasonably relevant to the cost of operating the hiring hall. We agree, for reasons stated below.

[7] 321 F. 2d at 135.

We remanded the case to the Board for further findings, stating that

> The Board should consider on remand what proportion of the fees which were paid were reasonably related to the value of the services provided by the union, having in mind also the cost to the union of performing such services. Any excess over that amount could properly be ordered returned to the men who paid it.*
>
> * The Board will, of course, have in mind our rejection of the finding of blanket discrimination in determining whether such an order is warranted.[8]

After proceedings held pursuant to the remand, the Trial Examiner issued a supplemental decision recommending that the union be ordered to refund $3.50 of every $10.00 permit fee received during the pertinent period, with interest at six percent. He reached the $3.50 figure by adopting and applying the formula suggested by the General Counsel for determining what proportion of the fees was reasonably related to the value of the services. The General Counsel's formula permitted the union to claim as allocable to the hiring hall all union expenses except those which are "institutional" in character. The union was allowed to claim, for example, all of its office expenses, but assessments imposed by the International, litigation expenses, and other expenses unrelated to the union's bargaining agent and hiring hall activities, such as expenses of dinners, meetings, and conventions, were not allowed.

The Board adopted the findings, conclusions, and recommendations of the Trial Examiner, finding the cost

[8] 321 F. 2d at 136.

allocation formula acceptable. It concluded that the permit fee was "excessive," stating that in making its determination, it had been mindful of our rejection of its earlier finding of blanket discrimination against permit men.[9]

The General Counsel submitted detailed calculations before the Trial Examiner showing the union's various expenses and explaining what amounts might, in his view, fairly be allocated to the running of the hiring hall. His calculations went virtually unchallenged, for the union refused to discuss the accounting issues involved.[10]

The union's position before the Trial Examiner, the Board, and this court has been that under our mandate on remand the permit men could be charged the fair value of *all* services received from the union. The union urges upon us that hiring hall costs cannot reasonably be separated from other expenses, and that permit men receive all benefits received by union members except the right to attend union meetings. It follows, the union contends, that permit men may be charged fees equal to the dues paid by union members.

The union clearly misinterprets our earlier opinion. When this case was first before us, we assumed that the permit fees were charged solely for the use of the hiring hall, because that was the only service for which the union had a right to charge the permit men.[11] Thus when we remanded for further findings, ordering the Board to consider what proportion of the fees was reasonably related to the "value of the services provided by the union," we

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[9] Nonmembers using the hiring hall.

[10] We think that the cost allocation formula was fair to the union. The union was allowed to charge entirely to the running of the hiring hall some costs, such as office expenses, which might be thought to reflect more than just the cost of running the hiring hall.

[11] See the language quoted *supra*, at note 7.

were referring to the value of the hiring hall services. The Board's interpretation of our mandate was correct. Furthermore, we have no reason to doubt that we were correct in limiting the permit fees to an amount reflecting the value of the hiring hall services only.[12]

We do not question the union's claim that permit men receive benefits not only from the hiring hall, but from the union's other activities as well. The difficulty with the union's contention that permit men should pay through their fees for any additional benefits received is that Congress has provided a different way for unions to meet this problem. The *proviso to § 8 (a) (3) of the National Labor Relations Act*[13] *authorizes unions and employers to enter into union security agreements for the limited purpose of compelling employees to pay union dues and fees.*[14] Moreover, the Supreme Court has made it clear that employers cannot refuse to bargain over any union security proposal which is confined to this purpose, whether the proposal be for a "closed shop," "agency shop," or some other arrangement designed to meet the "free rider" problem which Congress recognized in the proviso to § 8(a)(3) of the Act. *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963).[15]

Local 138 has obtained, through bargaining, the right to run an exclusive hiring hall for the employers involved

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[12] Cf. *Local 1351, Steamship Clerks and Checkers* v. *NLRB*, 329 F. 2d 259 (D. C. Cir. 1964), cert. denied 377 U. S. 993, sub nom. *Houston Maritime Association, Inc.* v. *NLRB*.

[13] 49 Stat. 452, as amended 61 Stat. 140, 65 Stat. 601, 73 Stat. 525, 542, 545; 29 U.S.C.A. § 158(a)(3).

[14] See *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 40-41 (1954).

[15] The employer is compelled to bargain under § 8(a)(5) of the Act, 29 U.S.C.A. § 158(a)(5).

in this case. Such an arrangement is clearly lawful.[16] But the union may not use the exclusive hiring hall to restrain or coerce employees in the exercise of their rights under § 157 of Title 29, United States Code,[17] or to cause an employer to discriminate against an employee so as to encourage or discourage membership in any labor organization.[18] We think it is clear that charging permit men a fee for the use of the hiring hall which is equivalent to the dues paid by union members on the theory that permit men receive all of the benefits of union membership will necessarily encourage union membership in violation of the permit men's § 157 rights; likewise, it will encourage employers to discriminate against employees so as to encourage union membership.[19] Unless the union can find some justification in the statute for its practice, then it has committed an unfair labor practice. No such justification is available. We have just discussed how Congress has provided unions with a specific means for meeting the problem of "free riders" which Local 138 has here tried to meet

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[16] *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U. S. 667 (1961).

[17] 29 U.S.C.A. § 157 gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and [also] the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[18] These are unfair labor practices under 29 U.S.C.A. § 158(b)(1) and (2).

[19] We do not mean to imply that we agree with the union that the permit men received all of the benefits of union membership. Clearly they did not. The union's expenses included such items as "members' death benefit payments," "florist and funeral cards," "Labor Day parade," and "soft ball team."

through the exclusive hiring hall. If the union wants union security, it may bargain for it. It may not short-circuit the system Congress has established by attempting to gain union security through an exclusive hiring hall. The union's interpertation of the Act would render purposeless the proviso to § 8(a)(3).[20]

The union argues that even if its practice of charging permit fees equal to union dues was unlawful, the Board's order is in the nature of a penalty, and it was improper to impose interest on the amount to be reimbursed. We think that the union is wrong on both of these points. Since the union was committing an unfair labor practice to the extent it charged the permit men a fee not reasonably related to the cost of providing the job referral service, the Board was amply justified in ordering the union to reimburse the permit men in the amount of fees paid in excess of the

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[20] The union claims support in the Board's decision in *Local 825, International Union of Operating Engineers*, 137 NLRB 1043 (1962). In that case, the permit fee was $9.00 monthly; union dues were $10.00, $1.10 of which was remitted to the International. It is not clear what the Board would have done in that case had part of the permit fees been remitted to the International, as they were here. And even if the union's interpretation of Local 825 were correct, the Board, when it adjudicates, has the power to make a reversal of doctrine applicable to the case before it. *NLRB* v. *A. P. W. Products Co.*, 316 F. 2d 899 (2d Cir. 1963). Moreover, the union's argument that it relied upon Local 825 is weak at best. That case was decided in 1962. The permit fees involved here ran from 1959 to mid-1963.

We are strengthened in our opinion as to the nature of the statutory scheme by evidence that in permitting unions to bargain for exclusive hiring halls, Congress intended that they should not be able to create a closed shop by the use of this device, but should serve simply as an employment agency and nothing more. See *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U. S. 667, 673 (1961). (Quotation of the views of Senator Taft.)

We express no opinion as to what collective bargaining agreements are adequate to obtain union security under the Supreme Court's holding in *NLRB* v. *General Motors Corp.*, *supra*, except to say that the hiring hall arrangement in this case clearly was inadequate.

value of the hiring hall services. Such an order clearly meets the requirement that a reimbursement order be remedial.[21]

The order is clearly remedial because it reimburses the permit men for fees illegally charged them; and of course in such a situation the permit men have lost the use of their monies. It is appropriate, therefore, that the union be required to pay interest to compensate them for this loss. The Board adopted the policy of imposing interest on remedial back pay orders in *Isis Plumbing and Heating Co.*, 138 NLRB 716, and *first applied the policy to the reimbursement of unlawfully exacted initiation fees, dues and assessments in Seafarers' International Union of No. America*, 138 NLRB 1142. The Courts of Appeals in at least seven circuits, including this one, have upheld this policy with respect to back pay orders.[22] Here, as in the back pay cases, the employees have lost the use of their monies, and it is only equitable to award them interest.

Enforcement granted.

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[21] See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* v. *NLRB*, 365 U. S. 651 (1961), and *Building Material Teamsters, Local 282* v. *NLRB*, 275 F. 2d 909 (2d Cir. 1960). Cf. *NLRB* v. *Cadillac Wire Corp.*, 290 F. 2d 261 (2d Cir. 1961).

In arguing that the order amounts to a penalty, the union relies on *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914 (2d Cir. 1960), cert. denied 366 U. S. 909 (1961). In that case, we held that the Board could not order an employer to reimburse employees for union dues paid by them. *Here the union received the benefit and must make the reimbursement.*

[22] *International Brotherhood of Operative Potters* v. *NLRB*, 320 F. 2d 757 (D. C. Cir. 1963); *Reserve Supply Corp. of Long Island, Inc.* v. *NLRB*, 317 F. 2d 785 (2d Cir. 1963); *NLRB* v. *Globe Products Corp.*, 322 F. 2d 694 (4th Cir. 1963); *NLRB* v. *George E. Light Boat Storage, Inc.*, 373 F. 2d 762 (5th Cir. 1967); *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB*, 331 F. 2d 720 (6th Cir. 1964), cert. denied 379 U. S. 888; *Revere Copper and Brass, Inc.* v. *NLRB*, 324 F. 2d 132 (7th Cir. 1963); *Marshfield Steel Company* v. *NLRB*, 324 F. 2d 333 (8th Cir. 1963).

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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. ...1243

NATIONAL LABOR RELATIONS BOARD,

Respondent,

v.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

WILLIAM J. CORCORAN,
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Supplemental Decision and Order.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD.

J. J. HAGERTY, INC.,
and
PETER BATALIAS.

Case No. 2-CA-6301.

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC.,
and
GARRETT NAGLE, An Individual,
and
EMPLOYER-MEMBERS OF NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC., listed in Appendix A,
Parties in Interest.

Case No. 2-CA-6302.

J. J. HAGERTY, INC.,
and
THOMAS EICHACKER, An Individual.

Case No. 2-CA-6323.

JOHN C. PETERSON CONSTRUCTION CO.,
and
WILLIAM HERBERT WILKENS.

Case No. 2-CA-6376.

Supplemental Decision and Order.

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix "A"; WELFARE FUND OF LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, and Trustees WILLIAM C. DEKONING, GIRARD DOUGLAS, JOHN GUNNING, VERNER SOFIELD, JOHN BUCHANAN, EDWIN REGNELL, JR., PAUL ROCHE and HERMAN SWITZER,

and

ROBERT CHRISTENSEN,

and

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix "B",

Parties in Interest.

Case No. 2-CA-7474.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

and

PETER BATALIAS,

and

GARRETT NAGLE,

and

THOMAS EICHACKER,

and

WILLIAM HERBERT WILKENS,

and

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix A, and BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix B,

Parties in Interest.

Case No. 2-CB-2423,
Case No. 2-CB-2424,
Case No. 2-CB-2440,
Case No. 2-CB-2472.

Supplemental Decision and Order.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
and
ROBERT CHRISTENSEN,
and
NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix "A"; and BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix "B",

Parties in Interest.

Case No. 2-CB-2931.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; and WELFARE FUND OF LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and its Trustees WILLIAM C. DEKONING, GIRARD DOUGLAS, JOHN GUNNING, VERNER SOFIELD, JOHN BUCHANAN, EDWIN REGNELL, JR., PAUL ROCHE and HERMAN SWITZER,
and
ROBERT CHRISTENSEN,
and
NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix "A", and BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix "B",

Parties in Interest.

Case No. 2-CB-2948.

On October 31, 1962, the National Labor Relations Board issued its Decision in the above-entitled proceeding,[1] finding that the Respondent Employers and the Respondent Union

[1] 139 NLRB 633.

had violated various sections of the National Labor Relations Act, as amended, and issued a remedial order based on such findings. In its original decision, the Board found, *inter alia,* that the Union's hiring hall was discriminatorily operated in that regular Union members were given preference in job referrals over permit men and ordered the Respondent Union to refund all permit fees paid by permit men during the pertinent periods.

On appeal to the Second Circuit Court of Appeals,[2] the court rejected the Board's finding of "blanket" discrimination against nonmembers in the operation of the hiring hall, but did find "some discrimination" against nonmembers. The Court also found that the amount of the permit fees charged nonmembers for use of the hiring hall was excessive and remanded the case to the Board for the purposes of determining

> * * * what proportion of the fees which were paid were reasonably related to the value of the services provided by the Union, having in mind also the cost to the Union of performing such services. Any excess over that amount could properly be ordered returned to the men who paid it.[2a]

On September 13, 1963, this case was remanded for hearing to determine the proportion of permit fees which should be returned to the men who had paid them. On August 19, 1964, Trial Examiner Frederick U. Reel issued his Supplemental Decision recommending that the Respondent

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[2] *N. L. R. B.* v. *Local 138, International Union of Operating Engineers,* 321 F. 2d 130 (C. A. 2), affirming in part, reversing in part, and remanding in part.

[2a] "The Board will, of course, have in mind our rejection of the finding of blanket discrimination in determining whether such an order is warranted."

Union refund $3.50 of every $10 monthly permit fee received during the pertinent period, as set forth in the attached Trial Examiner's Supplemental Decision.

Thereafter, the Respondent Union filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the supplemental hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered its original decision, the decision of the Second Circuit Court of Appeals, the Trial Examiner's Supplemental Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additional comments.

In light of the supplemental hearing and findings of the Trial Examiner, we conclude, in agreement with the court, that the permit fee charged here was excessive. We have considered the various items found by the Trial Examiner to be properly chargeable to the operation of the hiring hall and the policing of existing contracts, and, without necessarily endorsing the classification of each and every item, we find that the formula urged by the General Counsel and adopted by the Trial Examiner is an acceptable method of determining the costs chargeable to the permit men for the use of the hiring hall. We also concur in the Trial Examiner's view that for purposes of administrative convenience, the $3.50 ordered refunded is proper because it is unnecessary and to a certain extent, impracticable, to

determine with greater precision the exact amounts due or to vary the amount of refunds during each of the years here involved. Accordingly, we agree that the Respondent Union should refund $3.50 of every $10 permit fee received during the pertinent periods.[3]

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Supplemental Order of the Trial Examiner, and orders that the Respondent Union, Local 138, International Union of Operating Engineers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Supplemental Order.

Dated, Washington, D. C., July 9, 1965.

FRANK W. McCULLOCH, *Chairman.*
JOHN H. FANNING, *Member.*
HOWARD JENKINS, JR., *Member.*
(SEAL) NATIONAL LABOR RELATIONS BOARD.

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[3] In making the determination herein, we have been mindful of the court's rejection—which we have accepted—of our earlier finding that there was blanket discrimination against permit men.

Trial Examiner's Supplemental Decision.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD.

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

J. J. HAGERTY, INC.,

and

PETER BATALIAS.

Case No. 2-CA-6301.

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC.,

and

GARRETT NAGLE, An Individual,

and

EMPLOYER-MEMBERS OF NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC., listed in Appendix A,

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and

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and

WILLIAM HERBERT WILKENS.

Case No. 2-CA-6376.

Trial Examiner's Supplemental Decision.

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix "A"; WELFARE FUND OF LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, and Trustees WILLIAM C. DEKONING, GIRARD DOUGLAS, JOHN GUNNING, VERNER SOFIELD, JOHN BUCHANAN, EDWIN REGNELL, JR., PAUL ROCHE and HERMAN SWITZER,

and

ROBERT CHRISTENSEN,

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LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix "B",

Parties in Interest.

Case No. 2-CA-7474.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

and

PETER BATALIAS,

and

GARRETT NAGLE,

and

THOMAS EICHACKER,

and

WILLIAM HERBERT WILKENS,

and

NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC. and its EMPLOYER-MEMBERS Listed in Appendix A, and BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix B,

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Trial Examiner's Supplemental Decision.

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ROBERT CHRISTENSEN,
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Parties in Interest.

Case No. 2-CB-2931.

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; and WELFARE FUND OF LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and its Trustees WILLIAM C. DEKONING, GIRARD DOUGLAS, JOHN GUNNING, VERNER SOFIELD, JOHN BUCHANAN, EDWIN REGNELL, JR., PAUL ROCHE and HERMAN SWITZER,
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ROBERT CHRISTENSEN,
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NASSAU AND SUFFOLK CONTRACTORS' ASSOCIATION, INC., and its EMPLOYER-MEMBERS Listed in Appendix "A", and BUILDING TRADES EMPLOYERS ASSOCIATION OF LONG ISLAND, INC., and its EMPLOYER-MEMBERS Listed in Appendix "B",

Parties in Interest.

Case No. 2-CB-2948.

Harold L. Richman, Esq., and Arnold R. Harris, Esq., for the General Counsel.

William Power Maloney, Esq., of New York City for Local 138.

Before: Frederick U. Reel, *Trial Examiner*.

STATEMENT OF THE CASE

This proceeding came before me by direction of the Board pursuant to a remand ordered by the United States Court of Appeals for the Second Circuit. Prior events in this matter are summarized at 139 NLRB 633 and 321 F. 2d 130. The Board in the prior stages of this proceeding had ordered the Respondent Union to reimburse nonmembers of the entire amount they had paid as permit fees for the use of the Union's hiring hall. The Court of Appeals modified this order, and remanded the matter to the Board, stating:

> The Board should consider on remand what proportion of the fees which were paid were reasonably related to the value of the services provided by the union, having in mind also the cost to the union of performing such services. Any excess over that amount could properly be ordered returned to the men who paid it.

The matter thus remanded was heard in New York City on November 26 and 29, 1963, and—following an adjournment occasioned by the Union's expressed desire to apply to the Court of Appeals for a clarification of the remand and by subpoena enforcement proceedings instituted by General Counsel—on April 28, 1964. After the hearing briefs were received from General Counsel and the Union.

Upon the entire record and after due consideration of the briefs, I make the following:

FINDINGS AND CONCLUSIONS

I. The Conflicting Views as to the Intention of the Court of Appeals

General Counsel and the Union differ sharply as to the meaning of the Court of Appeals' remand in this case. According to General Counsel, the Board is directed to ascertain the fair value of the hiring hall services, and to refund to the permit men any excess they paid over that sum. According to the Union, the permit men are to be charged the fair value of all the services they received from the Union. The Union urges that the hiring hall costs cannot reasonably be separated from its other expenses, and emphasizes that permit men received all the benefits given union members, except for the right to attend union meetings, a privilege they did not desire.

The short answer to this issue is that the Trial Examiner is bound by the Board's interpretation of the remand, which accords with that of the General Counsel. The Union's contention that all its expenses redound to the benefit of the permit men as well as to the benefit of the members may well be accurate in a long-range view (although it takes a rather doctrinaire view of labor solidarity to find benefit to nonmembers in such matters as convention expenses, members' death benefits, goodwill contributions to other unions and litigating this and related cases before the Board), but the only expense for which the Union may lawfully charge the permit men is for "its services as an employment agency" (321 F. 2d at 135). The other services the Union renders permit men are services it renders as their statutory bargaining representative, and as to this permit men are "free riders" (*Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 41), as the Union had no union-security clause in its contract which would have required

nonmembers to pay the equivalent of dues in return for the Union's services. However, as appears below, General Counsel has urged a more lenient view of the Union's liability here, and is permitting the Union to claim as allocable to the hiring hall all union expenses except those which are "institutional" in character, *i.e.*, expenses incurred by the Union as an organization rather than in the course of making or policing collective-bargaining agreements. See *Local 825 Operating Engineers,* 137 NLRB 1043, 1044, 1046-1047; *Galveston Maritime Assn.,* 139 NLRB 352, 354-355.

II. General Counsel's Calculation as to the Amount to be Refunded

General Counsel in his brief submitted detailed calculations showing the Union's expenses, and explaining which amounts, in General Counsel's view, might be fairly allocated to the costs of the hiring hall. The Union, although invited, and indeed urged, to submit a reply brief setting forth any contrary views as to the accounting issues involved, failed to do so, but rested on its opening brief, which set forth the theory, rejected above, that all the Union's expenses redounded to the equal benefit of members and permit men. I am attaching hereto as Appendixes A through H the several computations submitted by General Counsel.

Briefly stated, General Counsel analyzed the Union's annual financial statements to ascertain which expenses were, in his judgment, allocable to the hiring hall. He divided these expenses in each year by the number eligible to use the hiring hall (union members plus permit men), and the quotient represented the cost per man of the hiring hall in that year. General Counsel therefore urges that the

permit men be refunded for each year the difference between the permit fees (normally $10 per month or $120 per year) and the cost of the hiring hall per man as thus computed.

The critical factor in these calculations is the determination of what expenses are fairly allocable to the hiring hall. General Counsel has permitted the Union to claim all its office expenses (rent, salaries, telephone, publication, stationery, payroll taxes, etc.), as allocable to the hiring hall, but has deducted the per capita taxes which the Union paid to its International, other assessments imposed by the International, expenses connected with litigating this case and other related cases before the Board, and other expenses incurred by the Union as an institution rather than as a bargaining agent, *e.g.*, expenses of meetings, dinners, and conventions, contributions to other organizations, and the like.

Although the period embraced by the appendixes attached hereto covers six fiscal years (the Union's fiscal years ending June 30, 1958 through June 30, 1963, inclusive), only the last four of those are involved to any appreciable extent. The fiscal year ending June 30, 1958, includes only 3 weeks (June 9-30) within the 6-month limitations period, as the charge was not filed until December 9, 1958. Also, the Union collected no permit fees between August 1, 1958 and April 30, 1959. Hence, refunds are due only for permit fees paid after June 9, 1958, until August 1, 1958, and also for permit fees paid from May 1, 1959, to June 30, 1963; no permit fees were collected after July 1, 1963.

In the fiscal year ending June 30, 1960, General Counsel would disallow as unrelated to the hiring hall approximately $54,000 of the Union's total expenses of $206,000. The total disallowed includes some $36,000 paid to, or

assessed by, the International; the balance is for conventions, conferences, expenses of union meetings, and other "institutional" expenses (such as tickets to dinners of other organizations) not relevant to job opportunities for nonmembers, or even to their continued employment or subsequent job opportunities. In the fiscal year ending June 30, 1961, General Counsel would disallow approximately $75,000 of the $225,000 expenses, including approximately $46,000 paid to the International, $10,000 for conventions, nearly $4,000 for "tickets and ads," over $2,000 for entertainment, and over $3,500 for the National Labor Relations Board litigation. In the next fiscal year General Counsel would disallow $75,000 of the $238,000 expenses, including $43,500 paid to the International, $10,000 for conventions, $6,000 for "tickets and ads," and $6,600 for members' death benefits and members' pins, to name two items which also figure, in smaller amounts, in the other years. In the last fiscal year in question the disallowed expenses ($85,000 out of $250,000) include over $37,000 paid to the International, nearly $15,000 for conventions, approximately $7,500 for "tickets and ads," and nearly $8,500 for "NLRB expenses" to name the leading items.

In my judgment, General Counsel has been more than fair to the Union in permitting it to allocate to the hiring hall many of the expenses reflected in the attached appendixes. For example, the annual salaries in each of these years exceeded $70,000, and it might well be argued that not all the salaries, and not all the miscellaneous office expenses, should be charged to the hiring hall services. In adopting, as I herewith do, the annual allocations recommended by the General Counsel, I do so with full awareness that as a result far harsher to the Union would be fully justified under the terms of the remand.

I do not, however, fully adopt General Counsel's final computations as reflected in Appendixes G and H. In any judgment, General Counsel draws the line too precisely in computing the refund per permittee at $42 in 1 year and $44 in another. Administrative difficulties are also involved in determining the amounts for the first two "partial" years. It should be remembered in proceedings of this nature that "Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion." *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U. S. 544, 561. The record in this case shows that the permittees obtained their permits by paying $10 each month or $120 per year. The record further shows that, although there is some minor variation from year to year, approximately $6.50 of this $10 was fairly allocable to the cost of the hiring hall. It seems to me preferable as an administrative matter, and essentially more equitable, to award a flat sum per man rather than to vary the amount by a few cents from year to year, depending on the refinements of the financial statement for that year.

I shall therefore recommend that the Union reimburse each permit man who paid for permits after June 9, 1958, at the rate of $3.50 for each $10 paid. As provided in the Board's original Order in this case, 139 NLRB at 639-640, 641-642, I shall recommend that interest be paid on the amount due in accordance with the formula there prescribed.

Upon the basis of the foregoing findings and conclusions and upon the entire record in the case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

SUPPLEMENTAL ORDER

Respondent Union, Local 138, International Union of Operating Engineers, AFL-CIO, shall:

(1) Reimburse all individual nonmembers for permit or service fees collected or exacted from them as a condition of referral or employment between June 9, 1958, and July 1, 1963, at the rate of $3.50 for each $10 collected or exacted, with interest computed at the rate of 6 per cent per annum on the basis of separate calendar quarters, with the interest to begin running as of the last day of the calendar quarter for monies due in that calendar quarter until compliance with the Order is achieved.

(2) Notify the Regional Director for the Second Region, in writing, within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[1]

Dated at Washington, D. C., August 19, 1964.

FREDERICK U. REEL,
Trial Examiner.

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[1] In the event this Recommended Order is adopted by the Board, this provision shall be modified to read, "Notify the Regional Director for the Second Region in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

SUPREME COURT, U. S.

APR 17 1969

JOHN F. DAVIS, CLERK

No. 1243

In the Supreme Court of the United States

OCTOBER TERM, 1967

LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–27) is reported at 385 F. 2d 874. The Board's supplemental decision and order (Pet. App. 28–43) are reported at 153 NLRB 1376.

JURISDICTION

The decree of the court of appeals was entered on January 4, 1968 (Pet. 17–18). The petition for a writ of certiorari was filed on March 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-048—68

QUESTION PRESENTED

Whether, where the union is the exclusive source of applicants for employment and it charges nonmembers a fee for the use of its hiring hall, the Board may properly order the union to reimburse the nonmembers for amounts collected from them in excess of the value of the hiring hall service.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition at pp. 2–4.

STATEMENT

A. THE INITIAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its original decision in this case, the Board found, *inter alia,* that petitioner Local 138 violated Section 8(b) (1)(A) and (2) of the Act, by operating a hiring and job referral system which granted preference to members of the Union,[1] and by exacting a permit fee from nonmembers for use of a system which thus discriminated against them.[2] 139 NLRB

[1] Local 138 had a collective bargaining agreement with an employers' association which provided that the Union would be the exclusive source of applicants for employment. 139 NLRB at 635, 650–651.

[2] The Trial Examiner also found that the fee charged the nonmembers was in itself discriminatory. The fee, $10 per month, was equal to the monthly dues paid by members, and there was no showing that such an amount was reasonably related to the cost of operating the hiring hall. Two members of the Board adopted the Examiner's additional ground, but the other members found it unnecessary to consider or adopt it. 139 NLRB at 636, 637, n. 8.

633, 636–637. The Board ordered the Union to cease and desist from maintaining any practice or enforcing any agreement which unlawfully afforded members preference over nonmembers in job referrals, or which conditioned referrals upon good standing with the Union. *Id.,* at 640–642. The Board also ordered the Union to "reimburse all individual nonmembers for permit or service fees unlawfully exacted from them as a condition of referral or employment with interest thereon at 6 percent * * *." *Id.,* at 641–642.

On review of the Board's order, the court of appeals, although rejecting the Board's finding of "blanket" discrimination against nonmembers in the operation of the hiring and referral system, found sufficient evidence to show "some discrimination" against nonmembers. 321 F. 2d 130, 134. Accordingly, the court granted enforcement of the portion of the Board's order directed to that matter. *Id.,* at 136. However, the court declined to enforce that portion of the Board's order requiring the Union to return the permit fees *in toto* to nonmembers, holding that the Board was unjustified in assuming that no value was received by the nonmembers for their fees. But the court agreed that the amount of the fees appeared to be excessive. *Id.,* at 135. Accordingly, the court remanded the case to the Board for the purpose of determining (*id.,* at 136):

> * * * what proportion of the fees which were paid were reasonably related to the value of the services provided by the union, having in mind also the cost to the union of performing

such services. Any excess over that amount could properly be ordered returned to the men who paid it.

B. THE SUPPLEMENTAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

On remand, the Board determined the fair value of the Union's referral service to the nonmembers who were required to pay permit fees. The Board considered the Union's annual financial statements, to ascertain which expenses were allocable to the operation of the hiring hall (Pet. App. 39; J.A. 140–213).[3] The Board then divided the sum of these expenses in each year by the total number of union members and permit men who were eligible to use the hiring hall, and obtained a quotient representing the cost of the hiring hall per man in that year (Pet. App. 39; J.A. 30).

In ascertaining the cost of operating the hiring hall, the Board included all of the Union's office expenses, such as rent, salaries, telephone, publications, stationery, accounting, payroll taxes, insurance, and general legal costs (Pet. App. 40; J.A. 18–29; 140–213). The Board excluded from these calculations the per capita taxes which Local 138 paid to its International,[4] other assessments paid to the International, the cost of liti-

[3] "J.A" references are to the portions of the record printed as a joint appendix to the briefs in the court of appeals. The appendix to the petition (Pet. App.) omits the appendices to the Trial Examiner's decision (J.A. 18–30).

[4] In its earlier opinion, the court of appeals noted that "of each $10.00 monthly payment, $2.00 was remitted by [Local 138] to the International." 321 F. 2d at 135. The record on remand includes an identical finding (J.A. 65–67).

gating this case and other related cases before the Board, as well as other disbursements which did not pertain to Local 138's operation of its hiring hall (Pet. App. 40–41; J.A. 18–19, 40–213). The Board also excluded, *inter alia*, expenses arising from meetings, dinners, conventions, contributions to other organizations, travel, apprentice school, Labor Day affairs, flowers, and the operation of a softball team (Pet. 41; J.A. 18–29, 77, 80–81, 99–100, 135–137, 140–213).

Based on the foregoing, the Board found that only $6.50 of the $10 fee charged nonmembers was fairly allocable to the cost of the hiring hall (Pet. App. 32, 42). The Board accordingly concluded that individual nonmembers of Local 138 were entitled to reimbursement for permit fees exacted from them as a condition of referral between June 9, 1958, and July 1, 1963, at the rate of $3.50 for each $10 collected, together with interest at the rate of 6 percent per annum on the amounts due (Pet. App. 32–33, 42–43). The Board so ordered (*ibid.*). The court of appeals sustained the Board's findings and enforced its order (Pet. 19–27).

ARGUMENT

The decision of the court of appeals is correct, and is in accord with the only other court of appeals decision involving the same question.[5] No issue warranting review by this Court is presented.

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[5] *Local 1351, Steamship Clerks* v. *National Labor Relations Board*, 329 F. 2d 259 (C.A. D.C.), certiorari denied, *sub nom. Houston Maritime Assoc.* v. *National Labor Relations Board*, 377 U.S. 993.

1. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their Section 7 right to refrain from supporting or joining a union, and Section 8(b)(2) bars a labor organization from causing discrimination in employment which would tend to encourage union membership. Since a union does not violate these provisions where it runs an exclusive hiring hall which does not discriminate against nonmembers in referrals for employment (*Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667), it is only fair that the nonmember be required to share the cost of this service, and hence a charge which is reasonably related to the cost of running the hiring hall is likewise not unlawful. However, where, as here, the nonmember is charged a fee which is the equivalent of the entire dues paid by a member (which dues cover the cost not only of the hiring hall but also of other benefits which the union provides for its members only), he is discriminated against relative to a member; the nonmember is forced either to pay for benefits which he does not receive or to pay more for the hiring hall service than a member does. Accordingly, the exaction of such a sum would tend to exert economic pressure upon the nonmember to join the union and receive "full value" for his money.

Contrary to petitioner's contention (Pet. 10–11), the Board was not required to show that nonmembers were *actually* coerced or encouraged to join the Union before it could conclude that the Union's practice of charging nonmembers the equivalent of union dues

for the use of the hiring service was violative of the Act. This Court has recognized that, in appropriate circumstances, the Board can infer coercion or the encouragement of union membership from the very nature of the conduct itself. See *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 44–52. For the reasons given above, such an inference was warranted here.

Nor is a contrary conclusion required by *Local 60, Carpenters* v. *National Labor Relations Board,* 365 U.S. 651. In that case, the Court declined to sustain a Board order requiring the union to reimburse "a lot of old-time union men" (*id.,* at 655) for dues and other monies paid to the union under an unlawful closed shop agreement; in the Court's view, since the employees had been members of the union when hired and "[s]o far as we know * * * for years on end" (*id.,* at 654), the Board was unjustified in presuming that they would not have continued making payments to the union absent the compulsion of the illegal contract. Here, on the other hand, the question is whether *nonmembers* have been discriminated against relative to members and have been induced to contribute more support to the Union than is warranted by the service which the Union has furnished them. See *Local 1351, Steamship Clerks* v. *National Labor Relations Board,* 329 F. 2d 259, 263 (C.A.D.C.), certiorari denied, *sub nom. Houston Maritime Assoc.* v. *National Labor Relations Board,* 377 U.S. 993. On the record here, the Board correctly answered that question in the affirmative, and its reimbursement order is an appropriate means of redressing the Union's unlawful practice.

2. There is no substance to petitioner's further contention (Pet. 11–16) that the court of appeals exceeded its reviewing authority in finding that the permit fees were unlawful on a ground not adopted by the Board. Having found in its first decision that the Board had proceeded on an erroneous legal principle in ordering reimbursement of the entire permit fee exacted from nonmembers, the court, in remanding the case to the Board, was empowered to enunciate the correct legal principle to be applied on the remand.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1968.

[6] It may also be noted that the principle enunciated by the court of appeals—*i.e.*, the fee was unlawful only to the extent that it exceeded the cost of the hiring service—was reflected in the alternative ground of the original decision of both the Trial Examiner and two Board members (*supra*, p. 2, n. 2).

U.S. GOVERNMENT PRINTING OFFICE: 1968